Internal Revenue Service
memorandum

CC:TL:Br2
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date: AUG - 1 1991

to: District Counsel, Nashville CC:NAS
Attention: Vallie C. Brooks

from: Chief, Branch No. 2, Tax Litigation Division CC:TL:Br2

subject: [redacted]:
Validity of Agreements to Extend Time Period for Assessment

This is in response to your request for advice on how best to oppose the assertion made by the petitioner in the subject docketed case that there can be no deficiency in income tax for the years in issue because the period of limitations for assessment expired before the statutory notice of deficiency had issued.

ISSUE

Were agreements purporting to extend the statute of limitations for assessment of income tax for the years in issue binding upon a successor corporation to a corporate taxpayer where the corporate taxpayer had formally ceased to exist under the applicable state law as a result of its merger into the successor corporation and where said agreements were executed in the name of the corporate taxpayer after the merger by an officer of the successor who had also been an authorized officer of the original corporate taxpayer before the merger.

FACTS

[redacted] (EIN [redacted]), a Tennessee corporation (hereinafter "[redacted]" or "[redacted]"), was organized in [redacted]. The stock was publicly-held until the corporation was taken private in [redacted]. It was acquired at that time through a cash tender offer by [redacted] ([redacted]). [redacted] was a wholly-owned subsidiary of [redacted] ([redacted]). [redacted] was owned by an outside investment group.

In [redacted], [redacted] formed [redacted] new Delaware corporations as subsidiaries: [redacted] ([redacted]); [redacted] ([redacted]); [redacted] ([redacted]); [redacted] ([redacted]); and [redacted] or [redacted]). [redacted] contributed stock of [redacted] to each of the new subsidiaries.

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During [redacted] and [redacted], after having adopted a plan of liquidation under I.R.C. § 332 and Treas. Reg. § 1.1502-34, [redacted] distributed the assets and liabilities of its [redacted], [redacted], [redacted], and [redacted] divisions to [redacted], [redacted], [redacted], and [redacted], respectively.

On [redacted], as the final liquidating distribution, [redacted] merged into [redacted] with [redacted] the surviving corporation. [redacted] day later, on [redacted], [redacted] merged downstream into [redacted], with [redacted] surviving. In [redacted], [redacted] merged downstream into [redacted] with [redacted] surviving. [redacted] eventually merged into [redacted] in [redacted], with [redacted] surviving.

The taxable years in issue are [redacted], [redacted], [redacted], and [redacted] of [redacted] and [redacted] of [redacted]. A series of Forms 872[1] purporting to extend the limitation period for assessment for these taxable years were, with one exception, executed in the name of "[redacted]." The taxpayer identification number shown in the designated block on the consents is that of the defunct Tennessee corporation, "EIN [redacted]." Some of these extension consents were executed before and some after the merger of [redacted] into [redacted]. The final Form 872 in the series, which purports to extend further the period for assessment of all [redacted] years of [redacted] in issue (signed by the taxpayer on [redacted]), was captioned in the name of "[redacted] (EIN [redacted]), a Delaware Corporation, successor by Mergers to [redacted] (EIN [redacted]), a Tennessee Corporation, and Subsidiaries."[2]

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[1] Copies were supplied by you for our reference.

[2] While we recognize that any prior invalid consent breaking a "chain" of extension agreements cannot be remedied by a later consent if the assessment period has already otherwise lapsed, we believe that the styling of the final Form 872 here provides potent evidence that the intent of the parties all along was that the Delaware successor corporation was acting in that successor capacity when it executed all the earlier consents in the name of the Tennessee predecessor corporation. Since [redacted] Delaware succeeded to all rights and liabilities of the terminated [redacted] corporation -- under either Delaware or Tennessee law -- we should argue that [redacted] Delaware could act in either corporation's name with respect to those rights or liabilities. Clearly, that was the intent expressly spelled out in the final Form 872 here. Further, this final consent could be viewed as a ratification by the successor corporation of the earlier possibly "voidable" consents of its defunct predecessor.

With respect to the [redacted] year of [redacted],[3] a series of three Forms 872 were executed purporting to extend the period for assessment until [redacted]. The first two agreements in this [redacted] series show the taxpayer to be: "[redacted] (Formerly [redacted])." The taxpayer identification number on these is EIN [redacted], which was the EIN of [redacted]. The third agreement shows taxpayer as: "[redacted] (EIN [redacted]), a Delaware Corporation, successor by Mergers to [redacted] (EIN [redacted]), a Delaware Corporation, and Subsidiaries." All three agreements were executed after [redacted], the day on which [redacted] had formally ceased to exist by merger into [redacted] under Delaware law. See Del. Gen. Corp. Law § 259(a).

Two transferee agreements (Forms 2045) and two consents to extend the time for assessment of liability as a transferee (Forms 977) were also secured from [redacted] (EIN [redacted]) in [redacted], with respect to its role as a transferee of both [redacted] and [redacted].

DISCUSSION

The period of limitation for assessment against a taxpayer under I.R.C. § 6501(a) is three years after the return is filed, except where the taxpayer and the Commissioner have entered into a written agreement to extend prior to the expiration of that three-year period. See section 6501(c)(4). The period so extended may be further extended by subsequent additional agreements. Id. The period for assessment against an initial transferee is one year after the expiration of the period for assessment, as extended, against the transferor. Section 6901(c).[4]

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[3] While not separately stated in each instance, the principles and rationales discussed in this memorandum will also apply to the validity of these [redacted] consents, since [redacted] was merged into [redacted] and [redacted] ultimately merged into [redacted].

[4] Since establishing the transferee liability of [redacted] for the income taxes owed by [redacted] for the years in issue depends upon establishing the validity of the Forms 872 statute extensions executed in the name of [redacted], the discussion herein focuses only on whether the Forms 872 were effective in extending the time for assessment of that original liability. If the Forms 872 were ineffective to extend the period of limitation on assessment, then the time for assessing transferee liability would have already expired by the time [redacted] signed the transferee agreements and Form 977 extension of transferee liability consents on [redacted]. In sum, [redacted] can only be liable as a transferee of [redacted] and [redacted] if it is shown first to be liable as a successor.

In this case, a series of extension agreements (Forms 872) were executed which purport to extend the period for assessment for the taxable years in issue of [redacted] (EIN [redacted]) through [redacted]. A statutory notice of deficiency was sent to [redacted] as successor corporation to [redacted] on [redacted], within the purported extended period for assessment.

Taxpayer asserts, however, that all the extensions executed after [redacted], are invalid. In its view, the limitation period on assessment for all the years in question had expired by the time the statutory notice of deficiency was issued. Since [redacted] merged into [redacted] on [redacted], the taxpayer's position is that any consents executed in the name of [redacted] after that merger are invalid because [redacted] had ceased to exist for such purposes under applicable state law. With the exception of the last consent in the series, all Forms 872 were executed in the name of [redacted]; the last one was executed on [redacted], by [redacted] as successor to [redacted].

Our position is that the aforementioned Forms 872 executed in the name of [redacted] did bind [redacted] to the extended assessment period and that the statutory notice here, issued within that extended period to [redacted] as the successor, was timely. Theories upon which [redacted] might be so bound are now examined, as are the respective litigating hazards of each.

Operation of State Law

[redacted] was a Tennessee corporation and [redacted] was a Delaware corporation (as was the successor to [redacted], [redacted]). Since [redacted] was a creation of Tennessee law, we must look to Tennessee law to determine its continued existence or powers, if any, after the merger.

The Tennessee Code, at the time of the merger here,[5] provided in pertinent part (at § 48-1-906(b)) that the effect of

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[5] Effective January 1, 1988, the relevant Tennessee Code sections cited herein were repealed and replaced with new sections. The effect of the new sections, though not governing in this case, are essentially the same as before repeal.

a merger[6] of a Tennessee corporation with a foreign corporation shall be as follows:

> The effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations, if the surviving or new corporation is to be governed by the laws of this state [Tennessee]. If the surviving or new corporation is to be governed by the laws of any state other than this state, the effect of such merger or consolidation shall be the same as in the case of the merger or consolidation of domestic corporations except insofar as the laws of such other state provide otherwise.

The applicable section governing the merger of two domestic corporations under Tennessee law at the time was § 48-1-905, providing inter alia that:

> (b) When the merger or consolidation has been effected:
>
> * * *
>
> (2) The separate existence of the parties to the plan of merger or consolidation, except the surviving or new corporation, shall cease;
> (3) The surviving or new corporation shall have all the rights, privileges, immunities and powers and shall be subject to all the duties and liabilities of a corporation organized under this chapter;

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[6] The case of a corporation that goes out of existence by way of a dissolution must be distinguished from one which was terminated as the result of a merger. The consequences of the two actions are different. Under Delaware General Corporation Law § 278, any dissolved corporation is nevertheless continued in existence for a term of three years for purposes of "winding up" its affairs. Compare Del. Gen. Corp. Law § 259, providing that a corporation "ceases" when it merges into another corporation and the other corporation survives. See also Tennessee Code §§ 48-21-106(a)(1) (merger, corporation ceases) and 48-24-105(a)(5) (dissolution, corporation continues in existence for purposes of winding up its affairs). In a merger there is by definition a successor corporation that succeeds to all the rights and liabilities of the constituent corporations terminated by way of that merger. In a dissolution there are only transferees of the corporate assets, there is no successor corporation as such. Transferee liability may be much more limited than successor liability. See generally Jahncke Service, Inc. v. Commissioner, 20 B.T.A. 837, 846 (1930); Southern Pacific Co. v. Commissioner, 84 T.C. 387, 393-95 (1985). We note this distinction here because some of the background material submitted with this request seems either to equate or confuse these two corporate reorganization processes as well as their respective effects.

(4) The surviving or new corporation shall thereupon and thereafter possess all the rights, privileges, immunities and franchises, of a public as well as of a private nature, of each of the merging or consolidating corporations; and all property, real, personal and mixed, and all debts due on whatever account, including, if a corporation for profit, subscriptions to shares, and all choses in action, and all and every other interest, of or belonging to or due each of the corporations so merged or consolidated, shall be taken and deemed to be transferred to and vested in the surviving or new corporation without further act or deed; and the title to any real estate, or any interest therein, vested in any of such corporations shall not revert or be in any way impaired by reason of such merger or consolidation;
(5) The surviving or new corporation shall thenceforth be responsible and liable for all the liabilities and obligations of each of the corporations so merged or consolidated; and <u>any claim existing</u> or action or proceeding pending by or against any of the parties <u>may be prosecuted as if such merger of consolidation had not taken place</u>, or the surviving or new corporation may be substituted in its place. Neither the rights of creditors nor any liens upon the property of any such corporation shall be impaired by such merger or consolidation[.] (emphasis added)

Thus, if the law of Tennessee were applied, the "any claim existing" language of § 48-1-905(b)(5) would, in and of itself, probably provide more than adequate support for ignoring the fact that the merger had taken place and treating [redacted] as continuing in existence at the time the Form 872 waivers were executed in its name. <u>See</u>, <u>e.g.</u>, <u>Brannon's of Shawnee, Inc. v. Commissioner</u>, 71 T.C. 108, 115 (1978) (similar language in Georgia merger statute validated waivers "signed" by terminated corporation).

Despite this result under Tennessee law, Delaware law does not include an exception for prosecuting "existing claims" by or against a terminated corporation. In Delaware, the continued existence of a corporation terminated by a merger depends upon there being an "action, suit or proceeding" already begun at the time of the merger. Del. Gen. Corp. Law § 261. Consequently, as taxpayers assert correctly, the law governing the surviving corporation ([redacted]) must be viewed as "providing otherwise." Pursuant to Tennessee Code § 48-1-906(b), therefore, Delaware law will govern the continued existence, if any, of the defunct Tennessee corporation. We feel that this difference in the two state statutory schemes is clear and that it would be futile to argue that the more favorable "effects provision" of the Tennessee law are consistent with Delaware law.

Nevertheless, since [redacted] succeeded to the federal income tax liability of [redacted] by operation of law under either state's regime, it necessarily succeeded to any rights to extend the time for the assessment of that liability. In our view, this succession to the right to agree to extend the statute of limitations is provided for specifically in Del. Gen. Corp. Law § 259(a):

> [T]he rights, privileges, powers and franchises of each of said corporations * * * shall be vested in the corporation surviving or resulting from such merger or consolidation[.]

As was succinctly stated by the Court of Chancery of Delaware in Fitzsimmons v. Western Airlines, 290 A.2d 682, 685 (1972):

> It is thus a matter of statutory law that a Delaware corporation may not avoid its contractual obligations by merger; those duties "attach" to the surviving corporation and may be "enforced against it." In short, the survivor must assume the obligations of the constituent.

If a Delaware corporation may not avoid its obligations by way of a merger with another Delaware corporation, surely Delaware law cannot reasonably be interpreted so as to allow a foreign corporation (i.e., one organized in Tennessee here) to do so when it merges with a Delaware corporation.

If Delaware law controls, as the taxpayer insists it must, then the obligations of [redacted] automatically attached to its successor (i.e., [redacted] and, in turn, [redacted]). While post-merger waivers were executed in the "name" of the terminated [redacted] by [redacted], the underlying potential income tax liability had "attached" to [redacted]/[redacted] by operation of law. As will be specifically explored below with regard to the equitable estoppel theory, [redacted] should not now be heard to complain of the fact that [redacted] was out of existence at the time of execution of the waivers when [redacted] was fully aware of [redacted]'s termination and ultimately responsible for its debts. Again, the language of the last in the series of Forms 872 executed here manifests what the intention of the parties were all along since it expressly recites the correct relationship between [redacted] and [redacted].

The hazard inherent in this argument, however, is that while the [redacted] liability may have attached to [redacted] by operation of law, [redacted] did nothing to extend the period for assessing that liability and that period had lapsed. The ultra vires act of a defunct corporation are not ascribed to its successor under either state's statute.

Existence of a "Proceeding"

Since petitioner maintains that Delaware law controls the effect of the merger upon the terminated Tennessee corporation by operation of Tenn. Code § 48-1-906(b),[7] if it were demonstrated that Delaware law would recognize the continued existence of [redacted] after the merger with [redacted], then the Forms 872 must be held binding. Yet, as next examined, the likelihood of success for such an argument here appears minimal.

The basic premise of the Delaware merger law is that all constituent corporations, except the surviving corporation, cease to exist in a merger. Del. Gen. Corp. Law § 259(a). Corporations "cease to exist on merger for all purposes, including service of process, unless the legislature provides otherwise." Beals v. Washington International, 386 A.2d 1156, 1161 (Del. Ch. 1978).

The Delaware legislature has "provided otherwise" by Gen. Corp. Law § 261 only:

> Any action or proceeding, whether civil, criminal or administrative, pending by or against any corporation which is a party to a merger or consolidation shall be prosecuted as if such merger or consolidation had not taken place, or the corporation surviving or resulting from such merger or consolidation may be substituted in such action or proceeding.

Our extensive research has turned up no relevant Delaware case authority nor legislative history that would shed light on what would constitute a prior administrative proceeding under Del. Corp. Law § 261 for purposes of continuing the existence of a Delaware corporation that has been terminated in a merger. The only Delaware cases construing that section have typically dealt with whether a shareholders' derivative suit survives a merger. See Lewis v. Anderson, 477 A.2d 1040 (Del. 1984), affirming, 453 A.2d 474 (Del. Ch. 1982); Folk, Delaware General Corporation Law § 261.1 (2d ed., 1988). Similar provisions from other states, however, have been addressed in federal tax cases.

In Field v. Commissioner, 32 T.C. 187 (1959), aff'd per curiam, 286 F.2d 960 (6th Cir. 1960), the Tax Court needed to interpret what constituted a "proceeding" sufficient to continue the de jure existence of a corporation after its formal dissolution under the applicable Michigan winding up statute. After determining that the Michigan provision was to be "liberally construed," the Tax Court found that the execution of waivers of the period of limitation on assessment and collection, the issuance of 30-day letters, the filing of protests, the assessment of deficiencies, the demand for payment of

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[7] As explained above, if the surviving corporation is governed by the law of another state, here Delaware, and Delaware law is inconsistent with Tennessee law, Tennessee will defer to the law of Delaware.

deficiencies, the filing of an offer in compromise and the submission of a check along with that offer, all constituted "an integrated administrative proceeding" which was within the Michigan statute's meaning of a "proceeding" and that this proceeding had commenced before dissolution or at least within the 3-year period of the corporation's extended life. Id. at 206-207; compare Paramount Warrior, discussed infra, at 1810 (only activity occurring prior to the effective date of the merger was filing of agreements to extend the assessment period and that did not "achieve the level necessary" to bring the case within Field).

Analogous results have been reached in other federal cases. See Wheeler's Peachtree Pharmacy, Inc. v. Commissioner, 35 T.C. 177, 182-83 (1960) (completion of revenue agent's examination and execution of successive consents to extension of the period of limitations on assessment do not constitute a proceeding or suit for purposes of extending the life of a dissolved Georgia corporation beyond its three year winding up period); Badger Materials, Inc. v. Commissioner, 40 T.C. 725, 732-33 (1963) (filing of an application for a tentative carryback adjustment, issuance of an informal conference letter and the conference that followed did not amount to the commencement of a proceeding as used in the Wisconsin winding up statute); Brannon's of Shawnee, Inc. v. Commissioner, 71 T.C. 108, 115 (1978) (no action or proceeding was pending to continue the terminated corporation's existence; however, Georgia merger statute also provided for existing "claims" to be pursued and those claims continued its existence); compare Bahen & Wright, Inc. v. Commissioner, 176 F.2d 538 (4th Cir. 1949) (statutory notice of deficiency issued within Delaware three-year winding up period was sufficient to constitute commencement of a "proceeding"); American Standard Watch Co. v. Commissioner, 229 F.2d 672, 675 (2d Cir. 1956) (under Rhode Island statute, a "proceeding" is "broader" than "action" or "suit" and taxpayer's claim for a refund of excess profits taxes constituted commencement of a proceeding that corporation had a right to pursue in the federal courts after its formal termination).

The "level of activity" involved in the instant case before the merger was limited; consequently, it is unlikely that this activity would be viewed by the Tax Court as having risen to a "proceeding." On the basis of the facts before us, we feel that a Del. Gen. Corp. Law § 261 theory that a "proceeding" was in progress at the time of the merger's termination of [redacted] would probably fail. You would need to muster additional facts to bring this case closer to Field, supra, to support an argument that a "proceeding" had commenced and [redacted] and [redacted] therefore continued in existence after their respective mergers into [redacted]

Equitable Estoppel

The essence of the principle of equitable estoppel was described by the Supreme Court in R.H. Stearns Co. v. United States, 291 U.S. 54, as being that one who prevents a thing from happening may not avail themself of the nonperformance which they have occasioned.

The Board of Tax Appeals applied the doctrine in Illinois Addressograph Manufacturing Co. v. Commissioner, 31 B.T.A. 498 (1934), in upholding the validity of consents extending the statute of limitations for assessment. This case is heavily relied upon by the Appeals Supporting Statement, a copy of which was forwarded to us along with your request for advice. The facts presented in Illinois Addressograph, however, appear to be somewhat more compelling for application of the equitable estoppel doctrine than those presented by the instant case.

In Illinois Addressograph, the petitioner was an Illinois corporation originally organized under the name of "Addressograph Company." It subsequently changed its name to "Illinois Addressograph Manufacturing Company" on August 24, 1927. A second corporation, "Addressograph Company," was incorporated under the laws of Delaware on August 4, 1927, at which time it took over about 95 percent of the assets and liabilities of the petitioner Illinois corporation, which remained in existence. Both corporations had the same address at all relevant times discussed in the case.

The returns of the petitioner (the Illinois corporation) for 1924 and 1925 were filed and audited under the corporate name "Addressograph Company." Notwithstanding its name change in 1927 and the fact that a different corporation had since been organized carrying that name, the petitioner still, under its original name: (1) held numerous conferences with the Commissioner's agents respecting the correct tax liability of the petitioner for the years in issue; (2) received letters from the Commissioner with reference thereto; and (3) filed refund claims and letters of protest on proposed deficiencies. During this process Form 872 extensions of the periods of limitation were also executed in the "old" name of the Illinois corporation (i.e., that of the Delaware corporation). Id. at 503.

The Board reasoned that since the Delaware corporation was not organized until 1927, it obviously had no tax liability to adjust or to pay for 1924 or 1925. The assistant treasurer who signed the petitioner's return and who occupied the same position with the new Delaware corporation of the same name was charged with knowledge of this fact. The Board concluded that he could not have meant to supply waivers of the statute of limitations for these years on behalf of the yet-to-exist Delaware corporation in a transaction that was free from fraud. Hence, the petitioner was estopped from denying the fact that the extensions were given on behalf of the Illinois corporation and was not allowed to repudiate those instruments. Id. at 504.

The factual situation presented in your request seems to differ significantly from that of Illinois Addressograph. Thus, reliance upon that case as controlling precedent for setting up an equitable estoppel here would be problematic. As was the case there, the officer signing the consents to extension here also knew that the "new" corporation did not yet exist in the years for which the extensions were being executed.[8] Having established that principle, however, is not the end of the matter. Unlike the "old" corporation in Illinois Addressograph, which was still around at the time of the waivers there, the "old" corporation here had long since gone out of existence.[9]

In Paramount Warrior, supra at 1811-12, the court refused to invoke the equitable estoppel doctrine to validate consents purporting to extend the statute of limitations for assessment where the consents had been executed in the name of a corporation that had been formally terminated in an earlier merger. After noting that the Commissioner bore the burden of proof on the question, the court said that the elements of estoppel include:

> (1) conduct, acts, language, or silence amounting to a misrepresentation or a concealment of the existence of a material fact; (2) the truth concerning that fact must be unknown to the other party who claims the benefit of the estoppel; (3) the party claiming the benefit must have relied upon the conduct, acts, language, or silence of the

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[8] In our case, [redacted] was not incorporated until [redacted], almost [redacted] years after the close of the [redacted] taxable years of [redacted] that were sought to be extended by the consents executed here.

[9] For this critical reason, we feel that the case of Woods v. Commissioner, 92 T.C. 776 (1989), also cited by the Appeals Supporting Statement, is distinguishable and should not be relied upon here. In Woods there were competent parties who both made a mutual mistake of fact. The court found it equitable to reform the language and enforce the agreement as the parties had clearly intended at the time of signing. It is an entirely different matter to say that Woods supports enforcing a purported agreement entered into by a defunct corporation against a different corporation. Such an agreement is void ab initio, unlike the agreement in Woods. The Woods case would only be useful support here if it can be demonstrated as a factual matter that use of [redacted], the "old" corporation's name, was a clerical mistake and that the Forms 872 were actually meant to be executed in the name of "new" [redacted].

> other party and must have been led to act upon the words or conduct of the other. [citation omitted]

Id. at 1811. The opinion went on to note that the court was not presented with "a situation where respondent was totally in the dark as to the fact that [taxpayer] had been merged until after the critical agreements were executed." Id. The "cold, hard fact" was that the respondent via one of its agents knew of the merger and thus had ample time and suitable avenues open to protect its interest. Id.

The court attributed the failure to secure the appropriate extensions to a "failure of [respondent's] representatives to coordinate their activities," and summarized the case as follows:

> What happened in this case is that respondent's representatives made a mistaken legal judgment as to the sufficiency of the agreements he had on hand. This is insufficient to satisfy the requirements of estoppel.

Id. at 1812.

The Paramount Warrior opinion discounted the holding of Illinois Addressograph saying that the Commissioner's reliance thereon was "totally misplaced" because the latter had dealt with a situation where "the transferor corporation was the petitioner and was still in existence. It sought on technical grounds to avoid agreements executed on its behalf and it was held estopped from so doing." (emphasis in original) Id. at 1812.

The Paramount Warrior opinion may be of rather limited precedential value to the taxpayer here, despite the apparent similarity of facts and the case's rejection of the equitable estoppel claim. In Paramount Warrior, the petitioner corporation occupied the dual capacity of successor as well as transferee. The Commissioner sought to hold the petitioner there liable as a transferee only. The Commissioner was compelled, nevertheless, to prove the binding effect of the chain of Form 872 extensions (which go to the primary liability) because the first and only Form 977 agreement extending Paramount's liability as transferee was signed within a year of -- but six months after -- the final Form 872 extension had already expired by its own terms. Transferee liability, if that, was all there was available. Consequently, if the extensions of the period for assessment of primary liability executed by the successor corporation in the name of the transferor corporation were invalid, the one year period for assessment of transferee liability would have also lapsed well before execution of the Form 977 extension of the period for assessment of transferee liability.

The Commissioner did not pursue the primary liability of the successor corporation (actually the same corporation as the petitioner transferee) in its specific capacity as such. As stated previously, the period for assessment of this primary liability was allowed to expire. See id. at 1807. The court's opinion notes that it was "not concerned with the issue of whether Warrior is estopped from denying that the agreements executed . . . were sufficient to bind it in respect of the primary liability devolving upon it by virtue of the merger." The Paramount Warrior opinion strongly suggests, at least, that the result might have been otherwise if in fact the Commissioner was seeking to enforce an agreement made by the successor upon which the primary liability had "devolv[ed] by way of the merger." See id. at 1811.[10] This latter situation is presented by the instant case; hence, this qualifying language of Paramonut Warrior should be brought to the court's attention.

In Badger Materials, supra, at 733, the Court also rejected an equitable estoppel assertion by the Commissioner where the terminating corporation had -- like [redacted] here -- filed a Form 966 informing the Service of its intent to dissolve. In that case, however, there were additional notices given to the Service, both before and after the dissolution. The court said petitioner was not estopped from denying termination under the applicable state law and the invalidity of the statutory notices of deficiency. It found only a mutual mistake of law. Id. at 734. A key finding for the court in Badger was that the corporate officer had acted in the good faith belief -- even though mistaken -- that he had authority to sign the consents. Id.

Success in establishing application of the equitable estoppel doctrine in this case will depend upon whether the court is willing to read Paramount Warrior as narrowly as we have suggested here it should be read. When urging it to do so, the court should be pointed to the language used in the last Form 872 executed as clear evidence of what the parties here intended right along (i.e., that [redacted] was executing in the name of [redacted] and [redacted] but as the successor corporation thereto). Since [redacted], was primarily liable as the ultimate successor to both [redacted] and [redacted] for their income taxes, it should not be allowed to escape that liability on what could be called a drafting technicality.

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[10] The court also stated, at 1809, that Paramount Warrior, as the surviving corporation, "took all the rights and assumed obligations of the constituent corporation as its own." These obligations and rights, by definition, do not evaporate with the termination of the predecessor corporation. If they survive that termination -- and they do by operation of law -- then the surviving corporation must have the authority to act to protect those rights and the responsibility to perform those obligations.

CONCLUSION AND RECOMMENDATION

For the foregoing reasons, it is our position that the Forms 872 in issue here were effective in binding the petitioner, [redacted], to an extension of the period of limitation for assessment of income tax for the years in issue in [redacted]'s primary liability capacity as successor corporation to both [redacted] and [redacted].

In the alternative, if the agreements were not effective by their own force, the doctrine of equitable estoppel should prevent [redacted] from denying the fact that it executed the consents in the name of [redacted] or [redacted] with respect to [redacted]'s own liability as successor.

There are, however, serious litigating hazards inherent in our position. These include: (1) the fact that the termination of [redacted] was arguably brought to the attention of the Service by way of the taxpayer's filing of the Form 966; (2) the likely adverse precedential effect of the Paramount Warrior case unless our rather narrow and very careful reading of that opinion is adopted by the court; (3) the absence of any solid case authority support for our equitable estoppel argument beside that offered by Illinois Addressograph, a case that can be distinguished; and (4) the absence of any significant support for the position that a "proceeding" was in progress within the meaning of the Del. Gen. Corp. Law § 261 so as to perpetuate the corporate existence of [redacted] or [redacted] as a matter of state law.

Petitioner has indicated that it plans on filing a motion for summary judgment on the statute of limitations issue. We recommend that the motion be opposed on the substantive grounds herein discussed. Further, with respect to such a motion, there is at least a genuine issue of material fact as to what were the intentions of the petitioner in signing the Forms 872 when petitioner's officer was fully aware that the address and EIN shown thereon were those of a defunct corporation with the same name as petitioner. See Illinois Addressograph discussion, *supra*. A summary judgment motion on the issue should fail on that ground alone.

Please contact Oreste Russ Pirfo of this office at FTS 566-8665 should you have any questions or need further assistance.

Alfred C. Bishop Jr.

ALFRED C. BISHOP, JR.